

\*\*E-Filed 8/26/2008\*\*

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

SALLY HERRIOT,

Plaintiff,

v.

CHANNING HOUSE,

Defendant.

Case Number C 06-6323

ORDER<sup>1</sup> DENYING PLAINTIFF'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT, DENYING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT AND  
GRANTING DEFENDANT'S  
MOTION FOR SUMMARY  
ADJUDICATION

Plaintiff Sally Herriot ("Herriot") is an eighty-nine year old resident of Channing House, a continuing care retirement community ("CCRC") located in Palo Alto, California. It is undisputed that she requires twenty-four hour care, has limited ambulatory capacity and suffers from dementia. She brought this action pursuant to the Fair Housing Act ("FHA"), the Fair Employment and Housing Act ("FEHA"), the Americans with Disabilities Act ("ADA"), the Rehabilitation Act and California state law following repeated requests by Channing House that she move from her private apartment, in which she lived independently for many years, to an

<sup>1</sup> This disposition is not designated for publication and may not be cited.

1 assisted living facility within the community. Herriot moves for partial summary judgment.  
 2 Channing House opposes Herriot's motion and moves separately for summary judgment, or in  
 3 the alternative, summary adjudication. For the reasons set forth below, both parties' motions for  
 4 summary judgment will be denied, but Defendant's motion for summary adjudication will be  
 5 granted.

## 6 I. BACKGROUND

7 Subject to an extensive regulatory scheme established by the State of California, CCRCs  
 8 function to provide a continuum of personal, nursing and routine medical care to residents over  
 9 the age of sixty-two. Channing House offers its residents three levels of care: independent living;  
 10 assisted living and skilled nursing. Independent living residents occupy their own apartments  
 11 without any restrictions on visitation. Assisted living and skilled nursing care are provided in  
 12 shared facilities.

13 CCRCs typically are organized under one of several models. Some offer "Type A"  
 14 contracts that require a substantial initial entrance fee and monthly fees that do not escalate  
 15 significantly as care needs increase. Exhibit 3, Gordon Report 4-5. "Type B" contracts do not  
 16 require an entrance fee and involve higher monthly fees related to the actual amount of care a  
 17 resident needs. Exhibit 2, Bragnisky Deposition, 107. "Type C" contracts offer straight fee-for-  
 18 service health care. *Id.* Channing House has offered Type A contracts exclusively since it was  
 19 established in 1964.

20 In 1992, Herriot and her husband signed a Type A contract and moved into an  
 21 independent living apartment at Channing House. The contract contains the following language:

22 when a Resident . . . Becomes so ill or enfeebled that, in the opinion of the staff  
 23 physician, more efficient care in the best interest of the Resident can be provided  
 24 in a care or skilled nursing unit . . . and that is not a temporary condition,  
 Channing House shall have authority to transfer resident to the appropriate  
 medical unit.

25 Exhibit 34, Herriot Deposition. When Herriot's' husband became ill in 2002, he moved into a  
 26 skilled nursing unit, leaving Herriot as the sole resident of the apartment. Herriot has remained  
 27 in her apartment since her husband's death in 2003.

1 In 2006, Herriot was hospitalized. At that time, Channing House contacted Herriot and  
2 her family informing them that it would be necessary for Herriot to transfer permanently either to  
3 assisted living or to skilled nursing when she returned from the hospital. Herriot, her family and  
4 Herriot's personal physician, Dr. Deidre Stegman ("Dr. Stegman"), objected to the transfer.  
5 Herriot returned to her apartment and retained private care for sixteen hours each day to assist her  
6 with hygiene, dressing and grooming activities. Dr. Stegman continues to believe that it is in  
7 Herriot's best interest to reside in her own apartment and receive private care rather than being  
8 transferred to assisted living or skilled nursing. Dr. Stegman has opined that a transfer would  
9 have a pronounced negative effect on Herriot's physical and mental health and would undermine  
10 Herriot's will to overcome the physical limitations associated with aging. Exhibit 20.

11 Channing House continued its efforts to facilitate a transfer following Herriot's return  
12 from the hospital. On April 25, 2006, Herriot received a letter informing her that: "Your physical  
13 condition and needs require that you be transferred to our on site Assisted Living Care. The level  
14 of care that you require exceeds that which may be lawfully provided in your current Independent  
15 living apartment." See Answer ¶ 34. On May 4, 2006, representatives of Channing House met  
16 with Herriot's family and also sent Herriot a letter confirming that three options had been  
17 presented for her, including a proposal that she move into a shared room in the assisted living  
18 facility but pay an additional \$25.00 a day to convert the room to a private room that she could  
19 furnish with some of her own belongings. On April 19, 2007, Channing House wrote a second  
20 letter stating the following:

21 this letter confirms that Channing House assessed you in the manner described to  
22 you in our letter dated March 15, 2007, and that your personal physician Dr.  
Deidre Stegman, and two sons, Robert and James attended.

23 ...  
24 Channing House has determined that based on your frailty, fall risk, dementia and  
need for assistance with all activities of daily living, you require transfer to a  
higher level of care in accordance with your continuing care contract.

1 Exhibit 13.<sup>2</sup> The Medical Director of Channing House, Dr. Jessica Davidson (“Dr. Davidson”)   
2 has testified that during the period in which the parties exchanged this correspondence, Herriot   
3 was not examined by any nurse or physician employed by Channing House and objected to such   
4 an examination being performed. Dr. Davidson explains that instead of conducting an annual   
5 assessment, she observed Herriot during two care conferences. Exhibit 27, 16, 17, 34.

6 Channing House also contacted the California Department of Social Services (“DSS”)   
7 regarding Herriot’s case. On July 5, 2006, Channing House wrote to Herriot informing her that   
8 while her transfer decision was being reviewed, Channing House would arrange for her to have   
9 care in her apartment during the hours when her private care provider was not in attendance. On   
10 February 22, 2007, a representative of Channing House contacted DSS indicating that despite   
11 Herriot’s refusal to allow annual assessments, Channing House had concluded that Herriot was in   
12 need of twenty-four hour assistance and had “limited ability to ambulate.” Exhibit 22. Herriot   
13 asserts that the letter of July 5, 2006 was intended not to provide an accurate assessment of her   
14 condition but rather to bolster Channing House’s relationship with DSS.

15 Herriot has not been transferred. She twice has requested that as an alternative to transfer   
16 she be permitted to remain in her independent living unit and receive private care at her own   
17 expense. She asserts eight claims in the instant action, asking that Channing House be held liable   
18 for: (1) discrimination or otherwise making unavailable a dwelling, in violation of 42 U.S.C. §   
19 3604(f)(1) and discriminating in the terms, conditions or privileges of occupancy of a dwelling   
20 because of a disability, in violation of 42 U.S.C. § 3604(f)(2); (2) failure to provide her with and   
21 denying her the opportunity to participate in or benefit from certain goods, services privileges,   
22 advantages and accommodations and failure to make reasonable modifications, in violation of 42   
23 U.S. C. §§ 12101; (3) denying her the opportunity to participate and benefit from living at

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24   
25 <sup>2</sup> On January 26, 2007, Herriot received a letter that was sent to all Channing House   
26 residents advising them that “the transfer rules have changed so that instead of being required to   
27 transfer you on certain statutory grounds, as of January 1, 2007, Channing House will have the   
28 discretion to make this determination on a case-by-case basis.” Bragnisky Declaration, Exhibit   
D. The legal effect of this letter is discussed below.

Channing House, in violation of § 504 of the Rehabilitation Act; (4) discrimination or otherwise making unavailable a dwelling, discriminating in the terms, conditions or privileges of occupancy of a dwelling because of a disability, refusing to make reasonable accommodations, and interfering with, threatening coercing or intimidating her, in violation of Cal. Gov. Code § 12900; (5) violating Cal. Civ. Code § 51; (6) denying full and equal access to housing in violation of Cal. Civ. Code § 54(b)(1) and refusing to make reasonable accommodations in rules, policies, practices or services, in violation of Cal. Civ. Code § 54.1(b)(3)(B); (7) violation of Cal. Bus. & Prof. Code § 17200; and (8) negligence.

Herriot moves for summary judgment with respect to her first, fourth, fifth and sixth claims. Channing House moves for summary judgment as to all of Herriot's claims.<sup>3</sup> The Court heard oral argument on February 8, 2008. At the hearing, the Court requested that Herriot

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<sup>3</sup> Herriot contends that Channing House actually has moved for *partial* summary judgment because it has not addressed the elements of Herriot's discrimination claim brought pursuant to 24 U.S.C. §§ 3604(f)(1) and (2). Federal Rule of Civil procedure 7(b) provides that motions "must . . . State with particularity the grounds for seeking the order. In its moving papers, Channing House argues that anti-discrimination laws do not require that it permit Herriot to remain in her independent living apartment because her proposed accommodation is not reasonable, and providing her with the requested accommodation would constitute a fundamental alteration of the CCRC model of care. These arguments directly address Herriot's accommodation claims. Channing House asserts that its grounds for denying Herriot's accommodation claims "must also absolve Channing House of [Herriot's] discrimination claims . . . which are entirely based on the legality of Channing House's transfer policy. . . . Channing House's motion contends only that [Herriot's] proposed accommodation is unreasonable and would fundamentally alter Channing House's model of care, but also, on the same grounds, that Channing House's transfer policy cannot constitute discrimination under the anti-discrimination laws." Channing House Reply Brief at 1.

A defendant may overcome a *prima facie* case of discrimination under 24 U.S.C. §§ 3604(f)(1) and (2) by asserting a legitimate non-discriminatory reason for its action. *See Community House Inc. v. City of Boise*, 490 F.3d 1041, 1053 (9th Cir. 2007). If proved, Channing House's assertion that the requested accommodation would fundamentally alter its model of care would constitute such a legitimate reason. Accordingly, the Court will treat that argument as directed to Herriot's 24 U.S.C. §§ 3604(f)(1) and (2) claims.

However, because neither party directly addresses Herriot's second claim brought pursuant to 42 U.S.C. § 12101 or her eighth claim for negligence, the Court declines to address these claims in this order. Either party may file an appropriate motion with respect to these claims in light of the legal analysis set forth herein.

undergo an independent medical examination. On May 29, 2008, the parties submitted a report prepared by Dr. Ami Laws (“Dr. Laws”), and thereafter submitted comments on Dr. Laws’s report.

## II. LEGAL STANDARD

A motion for summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party bears the initial burden of informing the Court of the basis for the motion and identifying the portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

If the moving party meets this initial burden, the burden shifts to the non-moving party to present specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324. A genuine issue for trial exists if the non-moving party presents evidence from which a reasonable jury, viewing the evidence in the light most favorable to that party, could resolve the material issue in his or her favor. *Anderson*, 477 U.S. 242, 248-49; *Barlow v. Ground*, 943 F. 2d 1132, 1134-36 (9th Cir. 1991).

## III. DISCUSSION

### 1. Accommodation and Disparate Treatment Claims

“To make out a claim of discrimination based on failure to reasonably accommodate, a plaintiff must demonstrate that (1) he suffers from a handicap as defined by the FEHA; (2) defendants knew or reasonably should have known of the plaintiff’s handicap; (3) accommodation of the handicap ‘may be necessary’ to afford plaintiff an equal opportunity to use and enjoy the dwelling; and (4) defendants refused to make such accommodation.” *Giebeler v. M&B Assocs.*, 343 F.3d 1143, 1147 (9th Cir. 2002). Once a plaintiff has made such a showing, the burden shifts to the defendant to produce rebuttal evidence that the accommodation is

unreasonable. It may do so by showing that the accommodation would impose “undue financial or administrative burdens” or a “fundamental alteration of the nature of the program.” *Id.* at 1157.

Plaintiffs seeking to assert a disparate treatment claim first must establish a *prima facie* case. Here, Herriot must show that: (1) she has a disability; (2) she was qualified to remain in an independent living apartment; (3) Channing House took steps to move her involuntarily;<sup>4</sup> and (4) Channing House permitted other residents similarly situated who do not fall within the protected category to remain in their apartments. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973); *Gamble v. City of Escondido*, 104 F.3d 300, 305 (9th Cir. 1997). Once the plaintiff has established a *prima facie* case, the burden shifts to the defendant, who must articulate a legitimate non-discriminatory reason for the application of its policies. If this burden is met, plaintiff must prove by a preponderance of the evidence that the reason asserted by the defendant is pretextual.

In this instance, each of these claims turns on the question of whether Herriot’s requested accommodation is reasonable. Channing House asserts that the accommodation is unreasonable per se because it would require Channing House to violate California law. Herriot’s independent living apartment is licensed as an Residential Care Facility for the Elderly (“RCFE”), as defined by Health & Safety Code § 1569.2(k).<sup>5</sup> Under 22 Cal. Code Reg. § 87455(c)(2), “[n]o resident

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<sup>4</sup> The second and third elements of a disparate treatment *prima facie* showing typically requires the plaintiff to show that: (1) plaintiff applied for housing; and (2) that application was denied. *See, e.g., Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1052 (9th Cir. 2006) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973)). However, the Ninth Circuit has adopted this test to fit the facts of the case at hand when necessary. *See Gamble v. City of Escondido*, 104 F.3d 300 (9th Cir. 1997).

<sup>5</sup> A Residential Care Facility for the Elderly is defined as:

a housing arrangement chosen voluntarily by persons 60 years of age or over, or their authorized representative, where varying levels and intensities of care and supervision, protective supervision or personal care are provided, based upon their varying needs, as determined in order to be admitted and to remain in the facility.

1 shall be accepted or retained [ in a Residential Care Facility] if . . [t]he resident requires 24-hour,  
 2 skilled nursing or intermediate care.” Additionally, 22 Cal. Code Reg. § 87615(a)(5), prohibits an  
 3 RCFE from retaining “[r]esidents who depend on others to perform all activities of daily living for  
 4 them as set forth in Section 87459.” 22 Cal Code Reg. § 87459 refers to the need for assistance  
 5 with the following activities: bathing; dressing and grooming; use of the toilet transferring in and  
 6 out of a bed or chair; continence; eating; vision; hearing; speech; and walking.

7 Dr. Laws found that Herriot requires and currently is receiving twenty-four hour care and  
 8 is suffering from dementia. The report states that Herriot “needs help with all her ADL’s<sup>6</sup>  
 9 including bathing, dressing, going to the toilet, transferring from bed to chair [and] feeding . . . .”  
 10 These findings are consistent with Channing House’s assessment of April 9, 2007 and with  
 11 Herriot’s own admission that she needs assistance with the activities of daily living. *See* Shea  
 12 Declaration, Exhibit A, ¶ 19. Herriot argues that pursuant to the statutory and regulatory changes  
 13 referenced in Channing House’s letter to its residents dated January 26, 2007, Channing House is  
 14 under no legal obligation to transfer her and may (and should) exercise its discretion to allow her  
 15 to remain where she is.

16 Were the medical evidence more equivocal, there well might be a triable issue of fact as to  
 17 whether Channing House would face legal liability for allowing Herriot to remain in her  
 18 independent living apartment. However, the record as supplemented by Dr. Laws’s independent  
 19 medical examination establishes conclusively that Herriot requires a type and degree of care that  
 20 Channing House may not lawfully provide in an independent living unit. 22 Cal. Code Reg. §  
 21 87455(c)(2); 22 Cal. Code Reg. § 87615(a)(5). Put differently, to the extent that the new  
 22 regulatory scheme vests it with discretion, Channing House may not exercise that discretion in a  
 23 manner inconsistent with the regulations. Accordingly, the Court concludes that Herriot’s  
 24 requested accommodation is unreasonable and that Channing House has a legitimate non-

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25  
 26 Health & Safety Code § 1569.2(k).

27 <sup>6</sup> Activities of Daily Living.

discriminatory reason for both its policy and its decision to transfer Herriot.<sup>7</sup>

## 2. State-Law Claims

California Gov. Code § 12955 provides: “[i]t shall be unlawful . . . for the owner of any housing accommodation to discriminate against or harass any person because of the . . . disability of that person.” For purposes of the provision, “discrimination” is defined, in part, as “refusal to make reasonable accommodations in rules, policies, practices or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy the dwelling. Cal. Gov. Code § 12927. “Because California law under Fair Employment Housing Act (FEHA) mirrors federal law under Title VII, federal cases are instructive in analyzing FEHA claims. *Grosz v. Boeing Co.*, 455 F. Supp. 2d 1033, 1039 (E.D. Cal. 2006). Herriot’s California Civil Code §§ 51 and 54.1 claims likewise require a finding of discrimination according to analysis under federal law. *Hawkins v. El Torito Rests., Inc.*, 63 Cal. App. 4th 510, 523-24 (Cal.

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<sup>7</sup> Channing House also argues that the proposed accommodation is unreasonable in light of Herriot’s continuing care contract, which expressly provides Channing House with the discretion to make transfer decisions. That contract provides, in relevant part, that:

[w]hen a Resident . . . becomes so ill or enfeebled that, in the opinion of the staff physician, more efficient care in the best interest of the Resident can be provided in a care or skilled nursing unit . . . And that it is not a temporary condition, Channing House shall have authority to transfer [the] Resident to the appropriate medical facility.

Exhibit 34. This provision, to which Herriot agreed when she became a resident of Channing House, vests Channing House with considerable discretion separate and apart from that available to it under the regulatory scheme. However, such discretion is not limitless, and the standard to be applied – the best interest of the resident – is different from that applicable to determinations made pursuant to the regulatory scheme. Indeed, Dr. Laws agrees with Dr. Stegman that moving Herriot to skilled nursing facility would *not* be in Herriot’s best interest and that Herriot likely would suffer both physically and mentally. It is not the Court’s function on a motion for summary judgment to evaluate the reasonableness of Channing House’s assessment to the contrary. Although it concludes that California law effectively requires Channing House to transfer Herriot to a skilled nursing facility, the Court does so with considerable reluctance in light of Dr. Stegman’s and Dr. Laws’s opinions as to the potential effect of the transfer on Herriot. *See also* n.7, *infra*.

1 Ct. App. 1998). For the reasons discussed above, the Court concludes that Channing House is  
 2 entitled to summary adjudication with respect to Herriot's FEHA claims. Accordingly, the Court  
 3 will grant summary adjudication with respect to Herriot's claim under the California Government  
 4 Code.

5 California's Unfair Competition Law ("UCL") defines "unfair competition" to include  
 6 "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. § 17200. By  
 7 proscribing any "unlawful" business practice, the UCL "borrows violations of other laws and  
 8 treats them as unlawful practices that the unfair competition law makes independently actionable."  
 9 *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 180 (1999).

10 Because Herriot cannot prevail on any of the claims adjudicated by this Order, the Court will  
 11 grant summary adjudication of her § 17200 claim as well.

### 12 3. Rehabilitation Act Claim

13 Channing House moves for summary judgment with respect to Herriot's fourth claim  
 14 brought pursuant to Rehabilitation Act § 504 on the grounds that Channing House is not a  
 15 recipient of federal funding. Herriot concedes that claim.


## 16 IV. ORDER

17 Good cause therefor appearing, IT IS HEREBY ORDERED that Herriot's motion for  
 18 summary judgment is DENIED. Channing House's motion for summary judgment is DENIED  
 19 without prejudice; its motion for summary adjudication is GRANTED as set forth above. In light  
 20 of the impending trial date of September 26, 2008, counsel are directed to attend a case  
 21 management conference on September 5, 2008 at 10:30 am to discuss future proceedings in this  
 22 matter in light of this order.<sup>8</sup>

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23  
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 25 <sup>8</sup> Because of the highly sensitive nature of this case, the Court again invites the parties  
 26 and counsel to explore the possibilities of a mediated settlement, perhaps one that involves an  
 27 agreed timetable for Herriot's transfer that will mitigate at least in part any physical and mental  
 28 detriment to Herriot. With the parties' consent, the Court is willing to provide direct assistance  
 in this regard.

1 DATED: August 26, 2008

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3   
4 JEREMY FOGEL  
United States District Judge

1 This Order has been served upon the following persons:

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